IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORIGINAL SIDE

WRIT PETITION NO.1838 OF 2004

Shivaji Krishna Zunjare ..Petitioner.
Vs.
State of Maharashtra & Ors. ..Respondents.

WITH

WRIT PETITION 1936 OF 2004

Sulkshana Suresh Bandekar ..Petitioner.
Vs.
State of Maharashtra & Ors. ..Respondents.

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Mr. M. D. Angal for the Petitioner.
Mr. Pradip Jadhav, AGP for Respondent Nos.1 and 2.
Mr. S.G. Surana, for Respondent No.3.
Mr. G.S. Hegde for Respondent No.6.
Mr. P.R. Naidu for Respondent No.7.

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CORAM : DR.D.Y.CHANDRACHUD, J.

23rd July, 2004.

ORAL JUDGMENT:

1. Rule, returnable forthwith. Counsel appearing on behalf of the Respondents waive service. By consent taken up for hearing and final disposal.

2. Both these Petitions are directed against an order passed by

the Slum Rehabilitation Authority on 8th April, 2004, holding that the Petitioners were ineligible to participate in a Slum Rehabilitation Scheme. In the circumstances, notices have been issued to the Petitioners to vacate the premises. In order to appreciate the controversy which arises in these proceedings, it would at the very outset be instructive to advert to the provisions of the Development Control Regulations for Greater Mumbai, more particularly, Regulation 33(10). By a notification dated 15th October, 1997, in exercise of powers conferred by sub section (2) of Section 37 of the Maharashtra Regional Town Planning Act, 1966, the State Government sanctioned certain modifications in Development Control Regulation 33(10) read with Appendix IV thereto. Clause I defines the eligibility for participating in a redevelopment scheme and provides as follows :

> "1. Eligibility for redevelopment Scheme – (a) For redevelopment of slums including pavements, whose inhabitants' names and structures appear in the electoral roll prepared with reference to 1st January, 1995 or a date prior thereto, but where the inhabitants stay at present in

the structure, the provisions of Appendix IV shall apply on the basis of a tenement in exchange for an independently numbered structure.

(b) Subject to the foregoing provisions, only the actual occupants of the hutment, shall be held eligible, and the so-called structure-owner other than the actual occupant if any, even if his name is shown in the electoral roll for the structure, shall have no right whatsoever to the reconstructed tenement against that structure." (emphasis supplied).

3. From these provisions it is clear that the primary condition which is stipulated for eligibility to participate in a redevelopment scheme is that the name of the inhabitant of a structure situated in a slum must appear in the electoral roll prepared with reference to 1st January, 1995, or a date prior thereto. Secondly, it is necessary that the inhabitant must reside in the structure. Thirdly, only the actual

occupants of hutments are eligible and, the right of a structure owner other than the actual occupant must give way to the right of the occupant even if the name of the owner of the structure is shown in the electoral roll. The owner of the structure, it has been clearly specified, shall have no right whatsoever to the reconstructed tenement against that structure. Clause 1.5 of Appendix IV then provides as follows :

> "1.5 A certified extract of the relevant electoral roll shall be considered adequate evidence to establish the eligibility of a person provided he is found residing in the structure. <u>This is to avoid the possibility of persons who have left the structure coming back to claim free tenement under the scheme even though they have in the normal course left the slum and gone away into a proper non-slum area or out of Brihan Mumbai.</u> If hutment dwellers are found resident in the structure, but the names are on the electoral roll on or prior to 1st January 1995 at another slum/pavement site in

Brihan Mumbai, they shall be considered eligible but only at the place of present residence. In case of doubt or dispute, the decision of the Competent Authority to be appointed by the Government in Housing and Special Assistance Department shall be final and binding on all the parties concerned. " (emphasis supplied).

Finally, it would be necessary to refer to clause 1.12, in that it provides an important condition which has a bearing on the present case :

"1.12. Automatic cancellation of Vacant Land Tenure - If any land or part of any land on which slum is located is under vacant land tenure the said tenure/lease created by Brihan Mumbai Municipal Corporation or Municipal Commissioner shall stand automatically terminated as soon as a slum rehabilitation scheme, which is a public purpose, on such land is prepared and submitted for approval to the

Slum Rehabilitation Authority. Any arrears of dues to be collected by Brihan Mumbai Municipal Corporation shall not be linked to the issue of any certificate or NOC relating to the Slum Rehabilitation Project."

Constitutional imperatives

4. While dealing with the present case, the Court cannot possibly overlook the circumstance that the decision of the Court is inextricably associated with a governmental policy which deals with the provision of housing to the marginalized and the poor. The entitlement to housing constitutes a basic human right and a fundamental right which has been recognized in judicial decisions under Article 21 of the Constitution. In Shantistar Builders v. Narayan Khimalal Totame ((1990) 1 SCC 520) the Supreme Court in a decision of three Learned Judges held that the right to life comprehends the right to shelter; the right to reasonable residential accommodation. The fundamental nature of the right to reside and settle in conditions of

dignity was recognized once again in a decision of two Learned Judges of the Supreme Court in J. P. Ravidas v. Navyuvak Harijan Uthapan Multi Unit Industrial Co-op. Society Ltd. (AIR 1996 SC 2151). The Court noted that since the decision in Olga Tellis v. Bombay Municipal Corporation (AIR 1986 SC 180) where the Constitution Bench held that the right to life included the right to residence, that was the position which has been adopted by the Court. In Ahmedabad Municipal Corporation v. Nawab Khan Gulab Khan (AIR 1997 SC 152), the Supreme Court held that the State, including its local bodies, constitute an integral part of the implementation of the Directive Principles contained in Part IV of the Constitution. The Court held that it was, therefore, the duty of the appellant before it to enforce schemes in a planned manner by annual budgets to provide a right of residence to the poor.

5. The issue of housing is the subject matter of significant jurisprudence in other developing societies. Section 26 of the Constitution of the Republic of South Africa, 1996 provides that

everyone has a right to have access to adequate housing; that the State must take reasonable legislative and other measures within its available resources, to achieve the progressive realization of this right and that no one may be evicted from their home without an order of Court made after considering all the relevant circumstances. There is an embargo against legislation that permits arbitrary evictions. The leading judgment in the area is Government of the Republic of South Africa v. Grootboom (2001) 4 SA 46 (CC). The Constitutional Court held that though Section 26(1) does not expressly say so, there is, at the very least, a negative obligation placed upon the State and all other entities and persons to desist from preventing or impairing the right of access to housing. The Constitutional Court then held thus :

> "A society must seek to ensure that the basic necessities of life are provided to all if it is to be a society based on human dignity, freedom and equality. To be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise. Those whose needs are the

> most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving realisation of the right. It may not be sufficient to meet the test of reasonableness to show that the measures are capable of achieving a statistical advance in the realisation of the right.... If the measures, though statistically successful, fail to respond to the needs of those most desperate, they may not pass the test ... The question is whether a housing programme that leaves out of account the immediate amelioration of the circumstances of those in crisis can meet the test of reasonableness established by the section."

6. There is a significant amount of debate in regard to the justiciability of socio -economic rights. For the purposes of the present case it is not necessary for this Court to enter upon this area. In the present case, there is a clear policy which has been adopted by the State Government in recognition of the right of housing for the marginalized and poverty stricken segment of society which resides in

slums. The Court is, therefore, neither called upon to lay down policy nor indeed to issue directions in regard to enforcement in an uncharted area. The constitutional imperatives are as strong in India as they are in South Africa. The interpretation which the Court places on legislative and administrative measures adopted by the State in recognition of the right to housing must effectuate and advance the salutary object underlying the adoption of those measures.

7. The facts in these two cases may now be considered in this background. The Municipal Corporation allotted a plot of land viz., Plot No.75(Part) admeasuring 66 ft x 30 ft. to the Maharashtra State Road Transport Corporation (MSRTC) on the basis of a Vacant Land Tenure. In June 1979, half the area of the plot was handed back to the Municipal Corporation. There is no dispute about the fact that the plot of land has been declared as a slum under the Maharashtra Slum Areas (Improvement, Clearance and Redevelopment) Act, 1971. MSRTC had constructed upon the plot three structures comprising of tin sheets which were originally used as a car garage, but were later

on converted to be used as service quarters for the employees. Two sheds out of the three were given to an employee of the MSRTC by the name of Mangesh Krishna Bandekar, while another shed was given to Kamlakar Krishna Zunjare as service quarters. The Petitioner in Writ Petition 1838 of 2004, Shivaji Krishna Zunjare, is the brother of the employee of the MSRTC which in turn is impleaded as the Seventh Respondent. The Petitioner in Writ Petition 1936 of 2004 is the daughter of the deceased employee of MSRTC, who in turn was allotted the service quarters. The Petitioner in Writ Petition 1838 of 2004 was in occupation of the premises together with his brother since 1982. His name appeared in the electoral roll for the first time in the year 1983 and has consistently thereafter been reflected in the electoral rolls. According to the Petitioner, he and his brother continued to reside jointly in the suit premises upto about 1990. As a result of disputes within the family, the Seventh Respondent left the suit structure and commenced residing at his own residential premises situated at Malad (West) Mumbai 400 064. According to the Petitioner, the Seventh Respondent did not thereafter return to the

premises. In so far as is material to this Petition, it is clear that in the voters list that has been prepared with reference to the cut off date of 1st January 1995, the name of the Seventh Respondent is shown not in the electoral roll pertaining to the premises in question, but premises which the Seventh Respondent had acquired at Malad. Therefore, for the purposes of these proceedings, it is evident that the Seventh Respondent had departed from the premises prior to the cut off date of 1st January 1995. The Petitioner was issued a communication dated 28th February, 1996 by the Deputy Collector (Encroachment), recognizing the status of the Petitioner as a protected occupier in pursuance of a survey which was conducted as far back as in September, 1990. The Petitioner continued to reside in the premises from 1982 until 17th June, 1997. An electoral identity card was issued to the Petitioner with reference to the suit premises in 1995 and on 4th March 1997 a document styled as Annexure II came to be issued to the Petitioner in which he was declared as eligible to participate in the slum rehabilitation scheme. In the meantime, on 6th November, 1997 the Slum Rehabilitation Authority issued a Letter of

Intent to the Sixth Respondent for carrying out development under the Slum Rehabilitation Scheme on the plot in question.

8. The Petitioner, it must be noted, had filed a petition being writ Petition 1444 of 1998 along with a group of 10 others challenging the Letter of Intent and development permission issued by the Slum Rehabilitation Authority to the Sixth Respondent. According to the Petitioner, the Additional Collector (Encroachment) after carrying out a physical verification, found the Petitioner to be eligible on 9th November, 1998. Thereafter, on 25th July, 2002, the Petition came to be disposed of in terms of minutes before R.J.Kochar, J. and there was a direction to the Chief Executive Officer of the Slum Rehabilitation Authority to redeterime the eligibility of occupants on the plot in accordance with law. Consequential directions were also issued that after the list of eligible occupants is finalized, those who had not already been enrolled as members of the society shall be enrolled and those found ineligible shall be deleted. In pursuance thereof a hearing took place before the Chief Executive Officer of the

Slum Rehabilitation Authority and by an order dated 16h November, 2002 the Petitioner was specifically held to be eligible, for the allotment of accommodation in the Slum Rehabilitation Scheme. The order of the Slum Rehabilitation Authority recorded that in this case the Petitioner was occupying the structure as on 1st January 1995 and that the relevant electoral roll supported his claim.

9. The order passed by the Slum Rehabilitation Authority was challenged by MSRTC in writ petitions before this Court which were disposed of on 3rd September, 2003. While remanding the matter back to the Slum Rehabilitation Authority, this Court directed a reconsideration of the position with reference to the definition of the expression 'occupier' in Section 2(e) of the Slum Areas (Improvement, Clearance and Redevelopment) Act, 1971. Thereupon, by the impugned order dated 8th April, 2004, the Slum Rehabilitation Authority came to the conclusion that the Petitioner was not entitled to participate in the Slum Rehabilitation Scheme. According to the Slum Rehabilitation Authority though the Petitioner

was in fact occupying the structure as on 1st January 1995, he was doing so in his capacity as a relative of an allottee of MSRTC service accommodation, that possession was taken from the Petitioner on 20th June, 1997 in pursuance whereof a Panchanama had been prepared. The Slum Rehabilitation Authority opined that thereafter, forcible possession was taken by the Petitioner who had reentered upon the structure.

10. While assailing the correctness of the order passed by the Slum Rehabilitation Authority, the counsel for the Petitioner submitted that the order is directly in the teeth of the relevant provisions of the Development Control Regulations and of the law which has been laid down by this Court. Counsel submitted that Development Control Regulation 33(10) and Appendix IV thereto postulate the recognition of the rights of actual occupants of structures which are situated in slum areas to the exclusion of the rights of the owners of the structures situated thereon. The definition of the expression 'occupier' in section 2(e)(v) of the Slum Areas (Improvement , Clearance and

Redevelopment) Act, 1971 comprehends a person who is eligible to pay to the owner damages for the use and occupation of any land or building and therefore, specifically comprehends a trespasser. The object of the legislation is to confer protection upon occupants in slum areas who by the very nature of their occupation do not have a right, title or interest and it is the occupation of these persons that is recognized and protected by law. This, it was urged, was also the view which was taken by a Division Bench of this Court in Taj Mohamed Yakub v. Abdul Gani Bhikan (1991 Mh.LJ. 263). On the other hand, on behalf of MSRTC and the Slum Rehabilitation Authority the order passed by the authority has been sought to be justified by submitting that the claim of the Petitioner was entirely as a member of the family of the Seventh Respondent and that the Petitioner himself had no right, title or interest to reside in the premises in his own right. The most vehement opposition in these proceedings has come from the Seventh Respondent who now seeks to assert a claim to participate in the Rehabilitation Scheme. He has, however, not challenged the order of the Slum Rehabilitation Authority

which in any event does not recognize his entitlement.

11. In considering the rival submissions which have been urged on behalf of the parties, it would be necessary to revisit some of the facts on which there is no dispute. MSRTC was originally allotted a plot of land of which some portion was surrendered back to the Municipal Corporation in 1979. On the plot, MSRTC originally constructed a garage which was then converted into three tin structures in which two employees came to be housed. These were initially tin sheds in respect of which makeshift accommodation was provided to the employees. The Seventh Respondent who was the original allottee departed from the premises some time prior to 1st January 1995. According to the Petitioner, the Seventh Respondent left the premises in 1990 and to this averment in the petition there has been no denial in the affidavit that has been filed on behalf of the Seventh Respondent. The electoral roll of 1st January 1995 does not contain the name of the Seventh Respondent as a resident of the structure in dispute and in fact his name appears in the premises which he had

purchased at Malad in his own right. Therefore, for the purposes of this Petition it would be necessary to proceed on the basis that the Petitioner was in fact a trespasser in the premises on 1st January 1995. On 28th February, 1996, the Deputy Collector (Encroachment) recognized, upon survey, the position of the Petitioner as a protected occupier.

12. What followed thereafter was remarkable, because MSRTC addressed a letter to the police on 17th June, 1997 recording that the Petitioner was in unauthorized occupation. The Petitioner was forcibly evicted from the premises with the help of the police and under the watchful eye of the Seventh Respondent, his own brother, who now has staked a claim to participate in the Slum Rehabilitation Scheme. Development Control Regulation 33(10) specifically recognizes the eligibility for participation in a redevelopment scheme of inhabitants whose names and structures appear in the electoral roll prepared with reference to 1st January 1995 or a date prior thereto. Sub clause (b) of clause 1 is clear in its terms when it lays down that

only the actual occupants of the hutments shall be held eligible and the so called structure owner other than the actual occupant shall have no right whatsoever to the reconstructed tenement even if his name was in the electoral roll. Clause 1.5 of Appendix IV provides that a certified extract of the relevant electoral roll shall be considered as adequate evidence to establish the eligibility of a person provided he is found to be residing in the structure. This is to avoid the possibility of persons who have left the structure coming back to claim a free tenement under the scheme even though they have in the normal course left the slum. Clause 1.12 of Appendix IV specifically lays down the automatic cancellation of Vacant Land Tenure. The provision is that if any land on which a slum is located is under vacant land tenure, such tenure or lease created by the Municipal Corporation shall stand automatically terminated as soon as a slum rehabilitation scheme, which is a public purpose, on such land is prepared and submitted for approval to the Slum Rehabilitation Authority. This provision is important because it operates to terminate the holding of MSRTC which was admittedly on the basis of a vacant

land tenure.

13. Now in so far as the Petitioner is concerned, he is a a trespasser who initially came into occupation of the structure since 1982. Undoubtedly, the initial character of the occupation of the Petitioner may have been in his capacity as the brother of the Seventh Respondent to whom the premises were allotted by the MSRTC. The Seventh Respondent, however, left the premises and the material date with reference to which the nature of the occupation must be considered is 1st January 1995. On that date, the Petitioner was for all intents and purposes a trespasser. Counsel for the Seventh Respondent has sought to place reliance on the circumstance that the Petitioner had instituted a suit in the City Civil Court for a declaration of his own right, title and interest, but that suit came to be dismissed in default and an injunction was declined therein. But, that is how it is expected to be, because in a suit instituted by the Petitioner his claim had to necessarily fail, even if it was heard on merits, because he had no right, title and interest and

could claim none. The important position which the Court must, however, recognize is that Development Control Regulation 33(10) confers legal recognition specifically upon a class of occupants who may otherwise not have any right, title or interest in law provided that their structures are situated on notified slums and that their occupation is of a date prior to 1st January 1995. This issue came up for consideration before a Division Bench of this Court in Taj Mohamed Yakub v. Abdul Gani Bhikan (1991 Mh.L.J. 263). This Court was called upon to interpret the Section 2(e)(v) of the Maharashtra Slum Areas (Improvement, Clearance and Redevelopment) Act, 1971 which defines the expression ' ocupier' to include any person who is liable to pay to the owner damages for the use and occupation of any land or building. In that context, Mr. Justice M.L. Pendse (as the learned Chief Justice then was) speaking for a Division Bench held that a trespasser in occupation is an occupier within the meaning of Section 2(e)(v) and therefore, a decree for possession cannot be executed without securing the permission of the competent authority under Section 22. In that

context, the Division Bench held thus :

> “In our judgment, there is no reason whatsoever to exclude the trespasser from the ambit of section 2(e)(v) of the Act. A trespasser is a person who is liable to pay to the owner damages for the use or occupation of any land or building. The scheme of the Act also supports the interpretation we have put on section 2(e) and the definition of the expression “occupier”. .... Perusal of various sections of the Act leaves no manner doubt that the Legislature clearly contemplated that the expression “occupier” would take in its sweep every person who is in occupation of the area declared as slum area and irrespective of the character of possession of such person. The provisions were enacted for improvement of the slum areas and it is entirely irrelevant as to who is in occupation of such area and in what capacity.”

14. On behalf of MSRTC, it has been sought to be asserted that the Corporation is an occupier within the meaning of Section 2(e)(ii) of the Act. Section 2(e) defines the expression 'occupier' thus :

> "(e) "occupier" includes, --
>
> (i) any person who for the time being is paying or is liable to pay to the owner, the rent or any portion of the rent of the land or building in respect of which such rent is paid or is payable;
>
> (ii) an owner in occupation of, or otherwise using, his land or building;
>
> (iii) a rent-free tenant of any land or building;
>
> (iv) a licensee in occupation of any land or building; and
>
> (v) any person who is liable to pay to the owner damages for the use and occupation of any land or building."

15. Clause (ii) of Section 2(e) refers to an owner who is in occupation of, or otherwise using, his land or building. Sub clause (ii) of clause (e) must be read so as to afford a harmonious interpretation

of all the sub clauses in clause (e) and consistent with the object and purpose of the Maharashtra Slum Areas (Improvement, Clearance and Redevelopment) Act, 1971. The definition in Section 2(e) is an inclusive definition and includes an owner in occupation of or otherwise using his land or building. In sub clause (v) it includes, as the Division Bench held, a pure trespasser because he is a person who is liable to pay to the owner damages for the use and occupation of any land or building. What the Slum Rehabilitation Scheme has provided for in Development Control Regulation 33(10) read with Appendix IV thereto is to confer a legal recognition on the actual occupant and to the exclusion of the structure owner. Therefore, it is not necessary for the Court to express any conclusive opinion on whether an employer who has allotted service accommodation to an employee can still continue to be regarded as an occupier for the purpose of Section 2(e)(ii). Even if the argument as suggested by MSRTC is accepted, what the provisions of Development Control Regulation 33(10) have done is to confer legal recognition only upon a certain category of occupiers viz., those whose names appear in

the electoral roll as on 1st January 1995 or for a prior period and who are in actual occupation of structures situated on slum lands. Constructive occupation (if indeed such can be the nature of the right of an employer such as MSRTC in the present case) does not fall for protection under the terms of the Slum Rehabilitation Scheme. Development Control Regulation 33(10) confers legal recognition on the rights of an actual occupant whose occupation dates back at least to 1st January, 1995, to the exclusion of the rights of the structure owner. Even otherwise as already noted earlier, Development Control Regulation 33(10) read with Appendix IV specifically terminates a vacant land tenure. The provisions which have been laid down in Development Control Regulation 33(10) and Appendix IV thereto are manifestly intended to subserve an important purpose of protecting the interest of actual occupants of slum lands provided their occupation is as of 1st January 1995, or prior thereto.

16. In the circumstances, the conclusion which has been arrived at by the Slum Rehabilitation Authority in holding that the Petitioner was

ineligible is clearly and manifestly in error. In so far as the companion petition is concerned, here too it must be held that MSRTC as the owner of the structure has no right to participate in the Slum Rehabilitation Scheme in view of the clear provisions of Development Control Regulation 33(10) which confer such recognition only on the actual occupant and not upon the owner of the structure. In this view of the matter, both the Petitions are allowed. The impugned order passed by the Slum Rehabilitation Authority in so far as it holds that the Petitioners are not eligible to participate in the Slum Rehabilitation Scheme are quashed and set aside. There shall accordingly be a direction to the effect that both the Petitioners shall be eligible to participate in the Slum Rehabilitation Scheme subject to the fulfillment of all the requirements.

The Petitions are disposed of accordingly.

There shall be no order as to costs.

On the request of counsel appearing on behalf of the Slum

Rehabilitation Authority, this order shall remain stayed for a period of four weeks.

Parties to act on a copy of this order duly authenticated by the Associate/Personal Secretary of this Court.